court on 18th November, 1964 for the recovery of a sum of $1,175.50 for goods sold and delivered and services rendered by the plaintiffs to the defendant at the latter's request on various occasions in July 1964. As the summons issued against the defendant could not be served on him personally, the plaintiffs on 14th January, 1965 obtained an order for substituted service by posting copies of the summons and the statement of claim together with a sealed copy of the order on the notice board of the court house, Kuala Lumpur and on a conspicuous part of the premises at T/S Soon Yew Motor Company, 10-T, Kedai Hiler, Kuala Trengganu.

The order for substituted service provided that such service shall be deemed good and sufficient service on the defendant ten days after such last posting. The posting at the premises as required under the order was done, but no posting was done on the notice board of the court house, Kuala Lumpur. The action came up for hearing on 24th March, 1965 when the defendant failed to appear in court. The learned president made a note that the summons had been served and then gave judgment against the defendant for the amount claimed together with interest and costs.

On 17th August, 1965 the defendant made an application to have set aside the judgment which had been obtained against him *ex parte*. In his affidavit in support of the application he said that he came to know of the judgment on or about 10th August, 1965 when he was served with a bankruptcy notice based upon it, that he had no knowledge as to when and how the action against him was filed and he was not aware of the date of trial, that he did not owe any money to the plaintiffs and that he had valid, firm and good grounds to oppose the plaintiffs' claim. At the hearing of the application on 4th November, 1965, he gave evidence to say that he had written a letter to the sessions court asking the plaintiffs to supply particulars of the claim against him and that, as he was not in a position to answer the plaint in the absence of particulars, he would ask the court to re-open the case. An executive of the plaintiff company produced a cheque (marked R.1) which was sent by the defendant as payment for repairs to certain cars. He also produced a statement of account together with certain bills (marked R.2) which he said were handed to the defendant personally.

In the event the learned president dismissed the defendant's application on the ground that there was no merit at all in the application. In his grounds of judgment he stated that the defendant in his affidavit in support of the application had merely denied owing any money and that neither his belated statement of defence nor his affidavit disclosed any grounds for opposing the plaintiffs' claim. But in view of the basis upon which I thought that this appeal should be decided, I did not consider it necessary to go into the question as to the merits of the defendant's application.

A point which appeared to have been overlooked by the learned president was that the order of substituted service had not been complied with in that no copies of the summons, the statement of claim and the order were posted on the notice board of the court house in Kuala Lumpur. The effect of such non-compliance with the order was that there had been no good and sufficient service on the defendant, so that the plaintiffs had obtained judgment against the defendant irregularly.

In *Anlaby & Ors.* v. *Praetorius* [1] it was held that where a plaintiff has obtained judgment irregularly, the defendant is entitled *ex debito justitiae* to have such judgment set aside. Fry L.J. said in that case at page 769:—

> "There is a strong distinction between setting aside a judgment for irregularity, in which case the court has no discretion to refuse to set it aside, and setting it aside where the judgment, though regular, has been obtained through some slip or error on the part of the defendant, in which case the court has a discretion to impose terms as a condition of granting the defendant relief."

In *Craig* v. *Kanseen* [2] it was held that the failure to serve the summons upon which the order in that case was made was not a mere irregularity, but a defect which made the order a nullity, and therefore, the order must be set aside.

For the reasons stated I allowed the appeal, setting aside the order of the learned president and substituting in its place an order that the *ex parte* judgment against the defendant be set aside. In all the circumstances of the case I made no orders as to costs of the appeal and imposed no condition on the defendant as a term for setting aside the judgment.

Appeal allowed.

Solicitors: *Eugene Lye & Co.; Allen & Gledhill.*

PUBLIC PROSECUTOR v. TEOH GAIK BENG
PUBLIC PROSECUTOR v. CHUAH KHAY SOON

[A.Cr.J. (Ong Hock Sim J.) March 20, 1967]

[Penang — Criminal Appeal Nos. 6 & 16 of 1967]

Road Traffic — Unlicensed public service vehicle — Seizure of — Whether forfeiture mandatory — Road Traffic Ordinance, 1958, s. 92(1)(2) & (4).

Road Traffic — Disqualification — Special reasons — Road Traffic Ordinance, 1958, s. 74(2).

These two appeals involved one common issue, to wit, whether an order for forfeiture of a vehicle which had been seized under the provisions of section 92(2) of the Road Traffic Ordinance, 1958, for an offence under subsection (1) was mandatory under subsection (4), following a conviction. Another ground common also to both

cases was the failure of the magistrate to order a disqualification for offences under section 74(2) of the Ordinance.

In the first case the trial magistrate at the close of the case for the prosecution held that there was a case to answer on all the charges. As the defendant elected to say nothing the court convicted her. In mitigation she prayed for leniency saying she was the sole bread winner of the family, her husband was paralysed and she had 4 children, 3 of whom were schooling. She prayed that the "court will not order disqualification because it is from driving cars that I earn my living for myself and my family". Purporting to exercise the discretion vested in him under section 92(4) of the Ordinance, the magistrate made an order for the return of the car to the defendant because he felt that forfeiture of the car would cause grievous hardship and irreparable damage to the defendant. On the question of disqualification, while admitting that on decided authority "it is clear that a defendant is dependent on his car for a livelihood is not a special reason" the trial magistrate felt that "where in addition to the defendant being dependent on her car for her livelihood her entire family . . . was dependent . . . was different."

In the second case the defendant claimed that the passengers were his friends but there was sufficient ground for the trial magistrate to doubt the credibility of the witnesses called. The car in question was released to the owner under bond, prior to the trial. After conviction, the magistrate said: "I did not make an order of confiscation of the car under section 92(4) as I felt that under the section I had a discretion either to make an order of forfeiture or to release the car to the owner. I exercised my discretion and released the car to the owner." He did not disqualify because "the special reason advanced by the accused was that his car had now been licensed to carry school children."

Held: (1) following a conviction for an offence under section 92(4), a magistrate has no discretion but to make an order of forfeiture of the vehicle in question;

(2) in both cases there were no special reasons in law not to order disqualification.

Cases referred to:—

(1) *Public Prosecutor* v. *Man bin Abas* (1935), 1 M.C. 160.

(2) *Gun Kim Luu* v. *Public Prosecutor* [1961] M.L.J. 35 at p. 36.

(3) *Mohamed Salleh* v. *Public Prosecutor* [1962] M.L.J. 6.

(4) *R.* v. *Ng Hee Weng & Ors.* [1956] M.L.J. 85.

(5) *Public Prosecutor* v. *Lim Hock Seng* [1962] M.L.J. 398.

(6) *Kiaw Aik Hang Co. Ltd.* v. *Public Prosecutor* [1962] M.L.J. 276.

(7) *Public Prosecutor* v. *Mohamed Isa* [1963] M.L.J. 135.

MAGISTRATE'S CRIMINAL APPEAL.

Haji Suhaimi bin Dato' Haji Kamaruddin (Deputy Public Prosecutor) for the appellant.

David Choong for the 2nd respondent.

Cur. Adv. Vult.

Ong Hock Sim J.: The learned deputy public prosecutor has appealed in these two cases, one from the Second Magistrate's Court, Penang in *Public Prosecutor* v. *Teoh Gaik Beng* (No. P(2) 3112 of 1966) and the other from First Magistrate's Court, Penang in *Public Prosecutor* v. *Chuah Khay Soon* (No. P(1) 1459 of 1966) which I propose to deal with at the same time as they involve one common issue only, namely, whether an order for forfeiture of a vehicle which has been seized under the provisions of sub-section (2) of section 92 of the Road Traffic Ordinance, 1958 for an offence under sub-section (1) is mandatory under sub-section (4), following a conviction.

In the first case, the learned magistrate at the close of the case for the prosecution held that there was a case to answer on all three charges. Defendant elected to say nothing. The court in the circumstances is left with no option but to convict. (*Public Prosecutor* v. *Man bin Abas* (1)). In mitigation the defendant prayed for leniency saying she was the sole bread winner of the family, her husband is paralysed and she had 4 children, 3 of whom were schooling. She prayed that the "court will not order disqualification because it is from driving cars that I earn living for myself and my family." The trial magistrate purported "in the exercise of the discretion vested in me under section 92(4) of the Ordinance", to make an order for the return of the car to the defendant because "I felt that forfeiture of the car would cause grievous hardship and irreparable damage to the defendant (and consequently her family) with whom I had decided to be lenient".

In the other case under appeal by the learned deputy public prosecutor, here again the defence was called. The defendant claimed the passengers were his friends but I consider that there was on the record sufficient ground for the magistrate to doubt the credibility of the two witnesses called who contradicted each other. Another witness offered was not called. In the circumstances, therefore, I feel that I should not interfere with the conviction made, having regard to the advantage of the court below in having seen and heard the witnesses and there being no other good or sufficient ground for me to disagree with the finding. The car here was released to the owner, one Lim Ewe Chye, under bond, prior to the trial. After conviction, the trial magistrate said: "I did not make an order of confiscation of the car under section 92(4) as I felt that under the section I had a discretion either to make an order of forfeiture or to release the car to the owner. I exercised my discretion and returned the car to the owner". If there is discretion it can only be exercised judicially. In the nett result since I am deciding that no such discretion exists, following a conviction, as I will state in grounds hereinafter appearing, I need not deal with the failure of the magistrate to give grounds for not so forfeiting.

In both these cases, the magistrates, after having convicted the respondents, had released the vehicles concerned being of the view that sub-section (4) does not impose an obligation to

forfeit. There is no dispute that the vehicles had been properly seized pursuant to sub-section (2). I do not blame magistrates for holding the view that they had discretion to forfeit or release in the light of reported cases. With the greatest deference to what was said by my brother judges, I find myself unable to agree and would set out my reasons.

The first reported case was *Gun Kim Luu* v. *Public Prosecutor* [2] where Ong J. (now F.J.) made the following remarks after allowing the appeal on other grounds:

"I would add a few remarks in connection with this case. The learned magistrate appears to have overlooked the provisions of section 92(4) of the Road Traffic Ordinance. In my view, a conviction under section 92(1) leaves no option for him but to confiscate the vehicle, and I would draw the attention of all magistrates to this point."

Unfortunately, in a subsequent case at Ipoh (*Mohamed Salleh* v. *Public Prosecutor* [3]), where "there was no evidence in the record to establish the vehicle had been seized" and therefore no case for the operation of sub-section (4), the learned deputy public prosecutor saw fit, where no such question arose in that appeal, to express his opinion that he found difficulty in supporting the order of confiscation notwithstanding the remarks of Ong J. in the case above referred to having regard to the wording of sub-section (4) of section 92. It seems to me that since there had been no seizure within the meaning of sub-section (2) of section 92, the order of forfeiture made was not maintainable and no question therefore arises whether sub-section (4) of section 92 imposes a mandate on the magistrate *upon conviction* to forfeit, as was pronounced by Ong J. in the case above cited. However the learned deputy public prosecutor who appeared invited the judge to make his observations on the said remarks of Ong J. and he quoted firstly the sub-section and as an emphasis underlined certain words therein which he considered relevant in the construction. I now set out the sub-section:

"An order for the forfeiture or for the release of any motor vehicle seized under the provisions of sub-section (2) shall be made by the court before which the prosecution with regard thereto has been held, and an order for the forfeiture of such vehicle may be made if it is proved to the satisfaction of the court that an offence against this section has been committed and that the vehicle was the subject matter of the offence, notwithstanding that no person may have been convicted of such an offence."

and the judge went on to say:

"Secondly, even if the first part of sub-section (4), to use the words of Ong J. leaves the court with no option, it is clear from the words I have underlined that the direction is to make either an order for forfeiture or for release."

There is no disagreement with the learned judge that sub-section (4) with the words underlined requires the court to make either an order for forfeiture or for the release. Indeed Good J. in *R.* v. *Ng Hee Weng & Ors.* [4] in construing identical words in section 123 of the Customs Ordinance, 1952 (an identical section is section 65(1) of the Excise Act, 1961) says:

"We do not consider that in the first part of section 123 the words 'an order for forfeiture or for the release of anything liable to forfeiture under the provisions of this Ordinance shall be made by the court before which the prosecution with regard thereto has been held' confer any discretion at all. In our view these words merely declare, as the learned Acting Solicitor-General put it in the course of his argument, the forum by which forfeiture or release may be made."

I do not consider that it is quite correct to say that "the question whether the order should be for forfeiture or for release is governed by the second part of the section" though I fully endorse what is said thereafter:

"If the matters specified therein are proved to the satisfaction of the court the court must order forfeiture both of the goods which were the subject matter of the offence and also of the goods (i.e. receptacles, packages, conveyances etc.) which were used in the commission of the offence, while if such matters are not proved to the satisfaction of the court then the court must order the release of the goods including any receptacles, packages, and conveyances in which they may have been found."

The second part in my opinion is to vest the court with a power to make an order of forfeiture "notwithstanding that no person may have been convicted of such an offence" upon proof to the satisfaction of the court of the matters specified. It would seem to me to be a misconstruction of law to hold that where there had been a conviction of any person charged with an offence, an order of release may yet be lawfully made. In such an event, would the magistrate have discharged his judicial functions properly where the law provides that it may be made if found proved notwithstanding no person is convicted. I am unable to subscribe to any construction that the words "for forfeiture or for release" confer an election *following a conviction* on the magistrate as to the order to make. I consider *R.* v. *Ng Hee Weng & Ors.* makes this quite clear.

The word "may" in the second part of section 92(4) is, in my view, inserted so that the court need not make an order of forfeiture though "proved to the satisfaction of the court that an offence against this section has been committed and that the vehicle was the subject matter of the offence" in the type of cases covered by the proviso to sub-section (1) which I quote:

"Provided that a person shall not be convicted of an offence against this section if he proves to the satisfaction of the court that he used the motor vehicle, the subject of the charge, as a taxi cab or hire car in an emergency for the purpose of conveying a sick or injured person to hospital or to bring medical aid to such person or for the purpose of making a police report to a police station and that he had made all reasonable efforts to hire a taxi cab or hire car for the purpose of the journey."

It would however authorise and may be require

the court to order forfeiture where user in contravention of sub-section (1) was not in the circumstances set out in the proviso.

I now commit the sin of transgressing beyond the bounds of these appeals and would respectfully disagree with the decision in *Public Prosecutor* v. *Lim Hock Seng* [5] and *Kiaw Aik Hang Co. Ltd.* v. *Public Prosecutor* [6] where the learned judge directed that magistrates should hold inquiries as a pre-requisite to the exercise of the power to order forfeiture and that an innocent owner of a motor vehicle (on hire-purchase, for example) confiscated pursuant to section 92(4) could apply to the court by way of revision. No provision for an inquiry, as is expressly enacted in the Customs Ordinance and in the Excise Act, is to be found in the Road Traffic Ordinance and magistrates would therefore be arrogating to themselves a jurisdiction not conferred by law. Such inquiries even in the legislation referred to is only exercisable *where there has been no prosecution.* The Road Traffic Ordinance unlike the Customs Ordinance, the Excise Act and the Dangerous Drugs Ordinance does not prescribe an automatic forfeiture after one month of the seizure, but sub-section (5) of section 92 expressly requires "if there be no prosecution with regard to any motor vehicle seized under sub-section (2) such vehicle shall be released at the expiration of one calendar month from the date of seizure unless it has sooner been released". The customs, the excise and dangerous drugs laws do not provide for inquiries unless there be no prosecution and a claim is made within one month of the seizure. There is no adjudication where there had been a prosecution. While I am also of the view that a judge has no power to entertain any petition by the owner whether by way of appeal or revision against an order of forfeiture made pursuant to section 92(4), I do not mean this in any way to derogate from the High Court's power to revise an order, be it of forfeiture or release, where the correctness, legality or propriety of such order is in question.

It may perhaps be pertinent to refer to the latest amendment to the Dangerous Drugs Ordinance (See Act No. 64 of 1966). Opportunity to show cause why the vehicle should not be forfeited under section 30(3) of Ordinance No. 30 of 1952 has now been repealed and it is now left to the Minister of Finance to exercise the same power as he has under section 125 of the Customs Ordinance to order the return of the confiscated article upon terms and conditions as he may prescribe. The desirability of such provision in the Road Traffic Ordinance is manifest as this will alleviate the mandatory forfeiture provision and enable an innocent owner to secure the release of the vehicle.

While the penalty of forfeiture may appear to be somewhat drastic, it can hardly be said that it is not commensurate with the evil which the legislature intended to deter or prevent and the consequences that follow may best be summed up in the words of Ong J. in *Gun Kim Luu's* case:

> "Another observation I would make is that it is time members of the public realise that it is in their own interest to use regular public service vehicles instead of unlicensed hire cars or taxis, because in the event of death or injury suffered by them while such vehicles are used in breach of the conditions of their insurance policy they can have no hope of recovering compensation from the driver or owner who, in practically all cases, are men of straw."

Another ground common also to both cases is the failure of the magistrate to order a disqualification for offences under section 74(2) of the Road Traffic Ordinance. "Special reasons" for not disqualifying are not special reasons connected with the offender but special reasons connected with the commission of the offence, *Public Prosecutor* v. *Mohamed Isa.* [7]

In the first case on the question of disqualification, while admitting that on decided authority "it is clear that a defendant is dependent on his car for a livelihood is not a special reason", the trial magistrate felt that "where in addition to the defendant being dependent on her car for her livelihood, her entire family . . . was dependent . . . was different". I fail so to see.

In the other case, the trial magistrate did not disqualify because "the special reason advanced by the accused was that his car had now been licensed to carry school children". This is not a special reason in law.

In both these cases, I hold the magistrates have misdirected themselves as to what constitutes special reasons.

For the reasons above, I allow the appeals and make the following orders:

1. The respondents be disqualified for a period of 12 months from date hereof for holding or obtaining a driving licence under Part II of the Road Traffic Ordinance.
2. The motor vehicles are ordered to be forfeited. This power is exercisable by an appellate court where the trial court had failed to make the order. (*R.* v. *Teo Woo Tin* [8]).

The fines imposed on all three charges I now confirm but I would make one further observation. Any special reasons for not disqualifying are required to be embodied in the order in accordance with section 74(2) which was not done in these cases by the magistrates.

Appeals allowed.

Solicitors: *Lim, Lim & Oon.*